

The Constitutionality of Censuring the President

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The recent impeachment of President Clinton led some members of Congress to propose censure as a penalty that would have punished the President, yet stopped short of removing him from office. The author argues that while actual conviction and removal from office is a drastic step, the use of censure as an alternative is both dangerous and contrary to fundamental Constitutional principles. After a discussion of Congress' attempt to censure President Andrew Jackson during the Bank War, the author sets forth several arguments against censure as a means of punishing the President. First, the use of censure is impermissible because it acts as an unconstitutional Bill of Attainder. Second, the censure of the President is impermissible given the textual language of the United States Constitution. Finally, the author focuses on the potential dangers that accompany Congress' ability to censure the President. Censure has the potential to upset the fundamental principle of separation of powers—a principle that essential to the workings of the United States Government.

I. INTRODUCTION

Joint Resolution—That it is the sense of Congress that (1) on January 20, 1993, William Jefferson Clinton took the oath prescribed by the Constitution of the United States faithfully to execute the office of President; implicit in that oath is the obligation that the President set an example of high moral standards and conduct himself in a manner that fosters respect for the truth; and William Jefferson Clinton has egregiously failed in this obligation, and through his actions has violated the trust of the American people, lessened their esteem for the office of President, and dishonored the office which they have entrusted to him; (2) (A) William Jefferson Clinton made false statements concerning his reprehensible conduct with a subordinate; (B) William Jefferson Clinton wrongly took steps to delay discovery of the truth; and (C) in as much as no person is above the law, William Jefferson Clinton remains subject to criminal and civil penalties; and (3) William Jefferson Clinton, President of the United States, by his conduct has brought upon himself, and fully deserves, the censure and condemnation of the American people and the Congress; and by his signature on this Joint Resolution, acknowledges this censure and condemnation.¹

On December 19, 1998, President William Jefferson Clinton was impeached

* This Note is dedicated to friends and my family, Bob, Barbara, Sarah, and Anna, and my grandparents, Jack, Fred, and Lucille, for their continued years of love and support. Never forget your dreams for they are the essence of life.

¹ This is the censure resolution proposed and voted down in the House Judiciary Committee. See *Judiciary Democrat's Resolution of Censure*, WASH. POST, Dec. 13, 1998, at A28.

by the House of Representatives,² becoming only the second President in United States history to bear this ignominious "scarlet letter."³ President Clinton was later acquitted in the Senate.⁴ Unlike the experience of President Andrew Johnson's impeachment, an alternative was cast into the mix. Public outcry over the President's actions coupled with reluctance to see him removed from office led congressional leaders from both parties and houses to propose a censure of President Clinton that would have stopped short of conviction and removal from office while still punishing him for his actions. Though this call for censure was abandoned after President Clinton's acquittal in the Senate,⁵ the enormity of the constitutional responsibility which may confront a future Congress demands an objective factual and legal analysis of whether censure is both wise and constitutional.

The Framers of the Constitution wisely adopted impeachment as the sole means for "defending the Community [against] the incapacity, negligence or perfidy of the Chief Magistrate."⁶ The inclusion of the impeachment clause⁷ in our Constitution was not met with universal approval by those who engaged in the debate over its necessity and wisdom,⁸ but no other means was provided in the Constitution whereby Congress could check the abuses of the Executive. To be sure, consideration of impeachment and removal from office will always be a drastic step, but to permit an alternative allowing Congress to ignore the responsibility vested in it is to create a dangerous precedent and subvert fundamental constitutional principles.

This Note attempts to explain the relevant historical and constitutional

² See Peter Baker & Juliet Eilperin, *Clinton Impeached, House Approves Articles Charging Perjury, Obstruction; Mostly Partisan Vote Shifts Drama to Senate*, WASH. POST, Dec. 20, 1998, at A1.

³ President Andrew Johnson was the first, in 1868. See *id.*

⁴ See Peter Baker & Helen Dewar, *Clinton Acquitted; 2 Impeachment Articles Fail to Win Senate Majority; Five Republicans Join Democrats in Voting Down Both Charges*, WASH. POST, Feb. 13, 1999, at A1.

⁵ See *id.*

⁶ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 65 (Max Farrand ed. 1966) [hereinafter 2 RECORDS OF THE FEDERAL CONVENTION]; ALEX SIMPSON, JR., A TREATISE ON FEDERAL IMPEACHMENTS 11 (1916).

⁷ See U.S. CONST. art. II, § 4.

⁸ See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 64-69:

Mr. King expressed his apprehensions that an extreme caution in favor of liberty might enervate the Government we were forming . . . [U]nder no circumstances ought [the President] to be impeachable by the Legislature. This would be destructive to his independence and of the principles of the Constitution. He relied on the vigor of the Executive as a great security for the public liberties.

framework underlying the constitutionality of censure. The question is not whether censure is politically and publicly expedient, but instead whether censure comports with traditional principles of good government and the Constitution. Whether censure of the President becomes a regular occurrence on the political landscape may well depend on the answer to this question. As this Note will show, censure violates perhaps the most important bulwark of our country's liberties and rights: the separation of powers.⁹

Perhaps few issues abound with more significance than whether one branch of government may, with constitutional blessing, punish and denounce another coequal branch. This Note argues that constitutional blessing would be absent were censure to occur. Part II begins this effort with a historical analysis of the censure of President Andrew Jackson. As this Note will show, there is a fundamental difference between a house of Congress censuring its own members and censuring the president. Part III continues with a discussion on the Constitution's prohibition on bills of attainder.¹⁰ History and Supreme Court precedent demonstrate that censure falls squarely within this prohibition. Further emphasis will be placed on the exact nature of what a censure is, a "scarlet letter." Part IV.A focuses on a textual analysis of the Constitution, demonstrating that Congress lacks constitutional power to punish a coequal branch of government. Additional attention is paid in this section to show that censure is not an incidental power arising from the authority of impeachment; the two serve different purposes. Part IV.B expounds on the danger legislative censure of the President would cause to the fundamental principle of separation of powers; censure has the potential to upset the balance of our government, with potentially disastrous results. Taken as a whole, this discussion demonstrates the unconstitutionality of censuring the President.

II. THE CENSURE OF ANDREW JACKSON

A. *The Bank War*

On March 28, 1834, President Andrew Jackson was censured by the Senate.¹¹ By a vote of twenty-six to twenty it was resolved, "[t]hat the President . . . has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both."¹² Jackson, indignant and ever

⁹ See THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke, ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny [T]he preservation of liberty requires, that the three great departments of power should be separate and distinct.").

¹⁰ See U.S. CONST. art. I, § 9, cl. 3.

¹¹ See 10 CONG. DEB. 1187 (1834); ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR 141 (1967).

¹² 10 CONG. DEB. 1187 (1834).

the fighter, fired back with a "Protest," which was ordered by the Senate not to be entered into its Journal.¹³ As is the way with politics, power changed hands and the Democrats gained control of the Senate, expunging the censure resolution in 1837.¹⁴

The events leading up to this constitutional confrontation were themselves a test of the separation of our government's powers. Andrew Jackson created a political and constitutional upheaval during his Presidency which stirred the winds against him. In 1816, Congress chartered the Second Bank of the United States.¹⁵ The Supreme Court in *McCulloch v. Maryland* upheld the constitutionality of the Bank by denying states the power to levy taxes upon them.¹⁶ Perhaps it was a premonition of things to come that Jackson had opposed the admission of branches of the Bank of the United States to Tennessee, giving his personal approval and support in 1817 to a Tennessee law that imposed a prohibitive tax of fifty-thousand dollars a year on each branch.¹⁷ Though this occurred before the Supreme Court's decision in *McCulloch*, it foretold of "Old Hickory's"¹⁸ aversion to the Bank's existence.

Andrew Jackson used the veto power twelve times during his Presidency, more than all of the previous Executive vetoes combined.¹⁹ While properly chargeable with making the veto power a significant presidential instrument in directing legislation, President Jackson's frequent use of the veto dramatically

¹³ See 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1288-1313 (James D. Richardson, ed., 1897) [hereinafter 3 PAPERS OF THE PRESIDENTS]; see also REMINI, *supra* note 11, at 142-45.

¹⁴ See 13 CONG. DEB. 504 (1837). The resolution read in part as follows:

Resolved, That the said resolve be expunged from the journal, and, for that purpose, that the Secretary of the Senate . . . shall bring the manuscript journal . . . into the Senate, and, in the presence of the Senate, draw black lines round the said resolve, and write across the face thereof, in strong letters, the following words: "Expunged by order of the Senate, this 16th day of January, in the year of our Lord 1837."

Id. The Secretary did in fact "proceed to draw black lines entirely round the resolution, and to endorse across the lines the words '[e]xpunged by order of the Senate, this 16th day of January, 1837.' No sooner had this been done, than hisses, loud and repeated, were heard from various parts of the gallery." *Id.*

¹⁵ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹⁶ See *id.*

¹⁷ See MARQUIS JAMES, *THE LIFE OF ANDREW JACKSON* 557 (1938). The tax was later repealed, but only over his protest. See *id.* at 558.

¹⁸ "Old Hickory" was President Jackson's nickname. He acquired the sobriquet during the War of 1812 after one of his soldiers was heard to have said that Jackson was "tough as hickory," naming the toughest thing he knew. See REMINI, *supra* note 11, at 21.

¹⁹ See REMINI, *supra* note 11, at 81.

altered the balance of power between the Legislative and Executive branches.²⁰ As Senator Daniel Webster remarked, Jackson's assertion of the veto power "claim[ed] for the President, not the power of approval, but the primary power, the power of originating laws."²¹

However, it was Jackson's veto of the recharter of the National Bank on July 10, 1832²² which was perhaps the most important veto ever made by a President. He made both political and emotional reasons for his veto, but it was his views on the Bank's constitutionality which drew ire from Congress. Noting that the Supreme Court in *McCulloch* had ruled the Bank to be constitutional, Jackson declared: "To this conclusion I cannot assent."²³ President Jackson stated that, in addition to the Supreme Court, Presidents and the Congress also had the responsibility of following the Constitution, and that his veto of the Bank's recharter followed from that responsibility.²⁴

Though Jackson's viewpoint may be widely regarded today as proper, it was labeled by his opponents as extreme. Webster declared that "no President and no public man ever before advanced such doctrines in the face of the nation. There never was before a moment in which any President would have been tolerated in asserting such a claim to despotic power."²⁵ Senator Henry Clay, the eventual proponent of Jackson's censure, thought this assumed power to intrude upon the legislative process, declaring that such action was "hardly reconcilable with the genius of representative government."²⁶ These men and others saw Jackson's

²⁰ See *id.*

²¹ See DANIEL WEBSTER, 3 THE WORKS OF DANIEL WEBSTER 446 (Boston, Little Brown 1864).

²² See REMINI, *supra* note 11, at 82. The Bank's existing charter was to have expired in 1836. See *id.* at 109.

²³ 2 MESSAGES AND PAPERS OF THE PRESIDENTS 1144-45 (James D. Richardson ed., 1896) [hereinafter 2 PAPERS OF THE PRESIDENTS]. In addition, Jackson continued with a statement considered as radical ever heard till then concerning our separation of powers, though he was misunderstood:

It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.

Id. at 1145. President Jackson later clarified this statement, explaining that he meant to state that each branch of the government has its own responsibility to follow the Constitution, and that in the matter of the Bank he did not agree with the Supreme Court. See REMINI, *supra* note 11, at 83.

²⁴ See *id.*

²⁵ See WEBSTER, *supra* note 21, at 434.

²⁶ HENRY CLAY, 7 THE WORKS OF HENRY CLAY 524 (Calvin Colton ed., 1904).

newly assumed powers as inherently tending towards a monarchy, complete with its tyranny.

President Jackson's antipathy towards the Bank was well known and became a primary focus of the Presidential election of 1832. The National Republicans, led by their Presidential candidate Henry Clay, excoriated Jackson for his veto of the Bank's recharter.²⁷ However, Jackson saw many problems with the bank, feeling that its existence was unconstitutional and counterproductive. Furthermore, Jackson saw the Bank as corrupt and as exerting too much power over the public and government.²⁸

President Jackson won his reelection campaign in 1832 and became ever more aggressive towards the Bank, the charter of which was to expire in 1836. Jackson warned congressman James Polk that, despite his veto of its recharter, the Bank, "the hydra of corruption," was "only scotched, not dead."²⁹ Jackson thus began debating with his Cabinet the possibility of removing the deposits from the Bank and putting them into state banks.³⁰ Before Congress could reconvene, Jackson announced publicly that starting October 1, 1833, the government would stop depositing its funds in the Bank; furthermore, Jackson told his cabinet that the deposits already in the Bank would be incrementally withdrawn.³¹

Unfortunately for Jackson, his Treasury Secretary William J. Duane refused to carry out his order, and would not resign.³² As Duane was charged with the responsibility and power of removing the deposits, Jackson was faced with a quandary. By law, Duane was obligated to report to Congress his reasons should he remove the deposits, and was unwilling to remove them while Congress was in recess.³³ Jackson never doubted his constitutional ability to remove subordinate officers and promptly told Duane his services would no longer be needed, replacing him with Roger B. Taney.³⁴ Taney, sympathetic to Jackson's plan, promptly put the President's plan into order, thereby replacing a national banking system with one of deposit banking.

²⁷ See REMINI, *supra* note 11, at 92-93 (describing the National Republicans' characterization of the National Bank as this "great and beneficial institution . . . maintaining a sound, ample, and healthy state of the currency may be said to supply the body politic, economically viewed, with a continual stream of life-blood, without which it must inevitably languish and sink into exhaustion").

²⁸ President Jackson stated: "The Bank of the United States, a great moneyed monopoly, had attempted to obtain a renewal of its charter by controlling the elections of the people and the action of the Government." See 3 PAPERS OF THE PRESIDENT, *supra* note 13, at 1306.

²⁹ DONALD B. COLE, THE PRESIDENCY OF ANDREW JACKSON 186 (1993).

³⁰ See *id.* at 187.

³¹ See *id.* at 194; REMINI, *supra* note 11, at 122-23.

³² See REMINI, *supra* note 11, at 122-23.

³³ See *id.* at 124.

³⁴ See *id.*

B. *The Repercussions*

Andrew Jackson exerted prerogatives never before seen but enjoyed by Presidents ever since his time. His censure and condemnation on the Journal of the Senate were a direct result of these exertions. Had Jackson been cowed by the intimidation attempted by the Senate, our system of government would likely be a different one. The Senate's punishment of Jackson for his legitimate exercise of these powers should give pause to anyone considering the wisdom of censure as a legislative prerogative.³⁵ Yet, it is necessary to examine in full the justifications for and defenses against the propriety and constitutionality of this action in order to fully understand why censure was never intended by our Framers.

Henry Clay, defeated by Jackson in the 1832 election, was the leading proponent of the censure resolution, which denounced Jackson's actions and fixed his punishment as indelible disgrace on the Journal of the Senate.³⁶ Clay generally confined his denouncement of Jackson to Jackson's actions in firing Duane and removing the Bank deposits, but it was clear that Clay and his supporters were also motivated by a desire to condemn Jackson's use of the veto: "The general currency of the country, the life-blood of all its business is in the most imminent danger of universal disorder and confusion. The power of internal improvement lies crushed beneath the veto."³⁷

In his speech supporting the resolution to censure Jackson, Clay employed demagoguery to condemn the President's use of his powers: "We are . . . in the midst of a revolution, hitherto bloodless, but rapidly tending towards a total change of the pure republican character of the Government, and to the concentration of all power in the hands of one man."³⁸ Clay and his supporters were attempting to intimidate the President to follow their commands. Congress felt that any usurpations of those powers required the punishment of infamy. Had Jackson acceded to these reprobations and given way to legislative dominance, we might have a different system of government than we do today.³⁹

³⁵ Obviously, a difference in opinion over the proper use of the veto and removal powers of a President is different than the recent debate over the blameworthiness, personal and legal, of President Clinton. Yet, the fundamental subject of congressional inquiry can never be determinative of censure's propriety and constitutionality. For instance, upon whom would the duty devolve to make the initial determination that a given presidential action is a proper subject of the claimed power to censure? The answer is of course Congress, but Congress is ill suited, even in cases of impeachment, to impartially rule upon the blameworthiness of a President. A legislative trial of any person, President or ordinary citizen, carries with it the fundamental dangers sought to be avoided by the inclusion of the Bill of Attainder clause in the Constitution. See *infra* discussion Part III.

³⁶ See 10 CONG. DEB. 58 (1834); COLE, *supra* note 29, at 205–06; JAMES, *supra* note 17, at 656; REMINI, *supra* note 11, at 137–39.

³⁷ 10 CONG. DEB. 59 (1834).

³⁸ *Id.*

³⁹ Many of us can generally recall vetoes in the past that garnered our personal support or

We live in a country today where popular support is often the primary instrument in moving along public legislation. Jackson employed this tool in the Executive as never before seen.⁴⁰ Clay condemned him for this as well, stating "[b]y what authority does the President derive power from the mere result of an election?"⁴¹

Clay openly condemned Jackson for days on his alleged "open, palpable and daring usurpation"⁴² of the Constitution; if Jackson had said something, it was open to recrimination; if Jackson had performed an official act, it was subject to rebuke. In short, Clay and his supporters were determined to limit the power of their political enemy by any means possible. Yet, when it was complained of that the proper method for condemning the President's actions was impeachment, Clay discarded the idea as "impracticable."⁴³ Clay, when confronted with the argument that the censure resolution was judicial in character and therefore outside of proper legislative powers, countered that the resolution was "not judicial, either in its form or purposes; that it was next to impossible to bring the President to trial upon an impeachment, if that were designed."⁴⁴ This doublespeak, recognizing on one hand the need to distance the resolution from being associated with impeachment, and on the other recognizing that censure was the only alternative he could conjure to impeachment (given the lack of support), demonstrates Clay's awareness of the thin constitutional ice upon which he tread.

C. Jackson's "Protest"

Upon passage of the resolution, President Jackson fired back, "perfectly convinced that the discussion and passage of the above mentioned resolution were not only unauthorized by the Constitution, but in many respects repugnant to its provisions and subversive of the rights secured by it to other coordinate departments."⁴⁵ Jackson was perfectly aware of the importance this issue raised:

opposition. In some cases use of the veto will do good, in others ill. However, few today would doubt the ultimate wisdom of vesting in the Executive Branch the power of the "qualified negative." THE FEDERALIST, NO. 73, at 494 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961). Alexander Hamilton stated that the "primary inducement to conferring the power in question upon the executive is, to enable him to defend himself: the secondary is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence or design." *Id.* at 495. In this vein, it is ironic that Jackson was censured partly because he was employing a constitutional tool implemented to enable him to defend the powers of the Executive Branch against legislative encroachment.

⁴⁰ See REMINI, *supra* note 11, at 46, 107.

⁴¹ 10 CONG. DEB. 65 (1833).

⁴² 10 CONG. DEB. 58-74, 1171-88 (1834).

⁴³ 10 CONG. DEB. 1174 (1834).

⁴⁴ *Id.* at 1172.

⁴⁵ 3 PAPERS OF THE PRESIDENTS, *supra* note 13, at 1289.

Does a coequal branch of government have the authority to pronounce upon and discredit the President of the United States, except in cases of impeachment? Jackson felt strongly that the answer was no.

Aware that the Senate had assumed upon itself a judicial function unauthorized by the Constitution,⁴⁶ Jackson proceeded to demonstrate how impeachment was the only constitutional course proscribed for Congress. Indeed, he stated that the Senate had, by a majority, albeit less than necessary two-thirds concurrence, pronounced him "guilty of an impeachable offense."⁴⁷ Jackson declared that the only constitutional means by which the Senate could subject him to its judicial power was "in the cases and under the forms prescribed by the Constitution."⁴⁸ He found it just as repugnant to the Constitution that he had been judged guilty of an impeachable offense by less than two-thirds of the members present.⁴⁹

That President Jackson considered this as a stain and taint is certain. In remarking upon his censure proponent Henry Clay, Jackson remarked, "[o]h, if I live to get these robes of office off me . . . I will bring the rascal to a dear account."⁵⁰ It is equally certain that Jackson was concerned with his legacy, for in his "Protest," he eloquently described as the bitterest portion of a pronouncement of guilty by the Senate the disgrace upon his honor throughout history.⁵¹

The issue that most enraged Jackson was that he felt he had acted in accordance with the Constitution and the public interest. Jackson saw corruption and abuse as the defining characteristics of the Bank;⁵² not only were its policies unsound, but the Bank had attempted to directly influence the 1832 election, and

⁴⁶ See *id.* at 1292 (stating that "the whole phraseology and sense of the resolution seem to be judicial").

⁴⁷ *Id.* Jackson's protest stated that "[t]he resolution, then, was in substance an impeachment of the President, and in its passage amounts to a declaration by a majority of the Senate that he is guilty of an impeachable offense." *Id.*

⁴⁸ *Id.*

⁴⁹ See *id.* at 1294.

⁵⁰ REMINI, *supra* note 11, at 139 (citing 3 JAMES PARTON, *THE LIFE OF ANDREW JACKSON* 542 (New York, Mason Bros., 1861)).

⁵¹ As Jackson stated:

[T]hough neither removal from office nor future disqualification ensues, yet it is not to be presumed that the framers of the Constitution considered either or both of those results as the whole of the punishment they prescribed. The judgment of *guilty* by the highest tribunal in the Union, the stigma it would inflict on the offender, his family, and fame, the perpetual record on the Journal, handing down to future generations the story of his disgrace, were doubtless regarded by them as the bitterest portions, if not the very essence, of that punishment.

3 PAPERS OF THE PRESIDENT, *supra* note 13, at 1295.

⁵² See *id.* at 85; REMINI, *supra* note 11, at 44-45.

numerous instances were discovered tending to show the Bank was bribing government officials.⁵³ Furthermore, Jackson soundly felt that he had precedent on his side when he dismissed Duane as Treasury Secretary: "Nearly forty-five years had the President exercised, without a question as to his rightful authority, those powers for the recent assumption of which he is now denounced."⁵⁴ Jackson saw the Senate's action as an attempt to control the President's direction of his Cabinet.

President Jackson was also deeply concerned about the precedent the Senate's action might set. He felt the censure resolution presupposed a right in the Senate to interfere with legitimate exercise of presidential power. To this, Jackson forcibly replied that dangerous results might follow:

If the principle be once admitted, it is not difficult to perceive where it may end. If by a mere denunciation like this resolution the President should ever be induced to act in a matter of official duty contrary to the honest convictions of his own mind in compliance with the wishes of the Senate, the constitutional independence of the executive department would be as effectually destroyed and its power as effectually transferred to the Senate as if that end had been accomplished by an amendment of the Constitution.⁵⁵

Jackson wisely foresaw that Congress might similarly attempt in the future to subordinate other cabinet departments to its will instead of that of the President.⁵⁶ Of course, if Congress could succeed in influencing presidential actions once, it could do so again as to any matter with which they and the President might disagree.

The arguments which ultimately led to the expungement of Jackson's censure from the Senate's Journal rested primarily on the same principles and arguments used by Jackson in his "Protest." Jackson's Democratic supporters considered the act to be a judicial one outside the Senate's jurisdiction, as a bad precedent, and as a violation of the separation of powers.⁵⁷

⁵³ See REMINI, *supra* note 11, at 98–99.

⁵⁴ 3 PAPERS OF THE PRESIDENT, *supra* note 13, at 1305.

⁵⁵ *Id.*

⁵⁶ See *id.*

⁵⁷ See 13 CONG. DEB. 380–418, 428–506 (1837). Numerous speakers rose to Jackson's defense. Senator Benton stated that the resolve, "in all its various shapes and forms, was unfounded and erroneous in point of fact, and therefore unjust and unrighteous, as well as irregular and unauthorized by the constitution." *Id.* at 381. Senator Dana pointed out how the Senate had assumed powers not granted to it by the Constitution in stating that "the sentence of condemnation contained in this resolution was a judicial act, and could only have been done by a judicial tribunal." *Id.* at 393. He also feared the censure should be expunged:

[L]est it should be considered as a precedent. If, sir, it is permitted to remain, at some future period of great excitement, when passion and prejudice shall triumph over reason,

What lessons are to be learned of this episode? Perhaps the first to be learned is that our Constitution has survived many crises. The second, and more germane, is that the "club" of Congressional condemnation can be employed for political and partisan purposes; in holding this weapon over the head of a President, a genuine danger arises that a President less resolute than Old Hickory might be cowed to abandon his principles and convictions for fear of the damage to his legacy. It is not difficult to conceive of an irresolute Executive being susceptible to this intimidation. Finally, it is important to note that in expunging the resolution Jackson's supporters felt they were putting an end to its legitimacy; its danger was all too clear given its then present use.

III. CENSURE AS ATTAINDER

Andrew Jackson forgot to explicitly mention one unconstitutional aspect of the censure resolution condemning him: It possessed every aspect of a Bill of Attainder, which is expressly forbidden by the Constitution.⁵⁸ The Supreme Court, in *Cummings v. Missouri*, declared that a Bill of Attainder "is a legislative act which inflicts punishment without a judicial trial."⁵⁹ The prohibition is "intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."⁶⁰ If censure is intended as a punishment then it must fall within this constitutional prohibition.⁶¹

and the constitution shall be made to subserve the purposes of disappointed ambition . . . we may see the same scenes . . . acted over again; and the power of the Chief Magistrate broken, and that branch of the Government prostrated at the feet of this.

Id. at 395.

⁵⁸ See U.S. CONST. art. 1, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

⁵⁹ 71 U.S. (4 Wall.) 277, 323 (1866).

⁶⁰ *United States v. Brown*, 381 U.S. 437, 442 (1965).

⁶¹ Admittedly, the meaning of "censure" is an amorphous one subject to the circumstances in which it is employed. Black's Law Dictionary defines "censure" as "[a]n official reprimand or condemnation." BLACK'S LAW DICTIONARY 224 (6th ed. 1990). However, the weight and historical significance of a resolution of censure will largely depend on several factors. Obviously, the notoriety and importance of the public official censured will matter greatly as to history; the censure of a first-term congressman will not be possessed of the same import as one attached to the legacy of a President. In addition, the wording and language affixed to the resolution will indelibly affix to the recipient's name the opprobrium Congress wishes to convey; a censure resolution which simply states that one is "a bad person" will obviously not carry the same weight as one which delineates the very conduct for which the person is being censured. Furthermore, the pomp and circumstance connected to a censure resolution will affect the weight in which it is seen. If Congress conveys to the public that censure is a punishment, as with President Clinton, then its significance will vary according to the severity Congress

A. *The English Practice of Attainder*

The prohibition against bills of attainder⁶² was adopted by the Constitutional Convention unanimously and without debate.⁶³ The Framers were readily aware of its pernicious and despotic use in England and did not consider its use legitimate in a system based on separation of powers. To appreciate the Framers' antipathy towards bills of attainder, one must possess an understanding of its use in England.

Attainder was a weapon used by the English legislature to politically charge, judge and sentence citizens of all classes and political power.⁶⁴ Never infused with even basic notions of due process, citizens would be found guilty of offenses that they were either innocent of or had never before existed.⁶⁵ Numerous examples abound, but a few will explain its pernicious use. Blackstone relates a statute enacted during the reign of King William III which stated that any person who was educated in or made a profession of the Christian religion, "by writing, printing, teaching, or advised speaking," who denied the truth of Christianity or the divine authority of the Scriptures, was rendered, for the first offense, incapable of holding any place or office of trust; for the second offense, was rendered incapable of bringing any action, or of being guardian, executor, legatee, or purchaser of lands. In addition he was subject to three years imprisonment.⁶⁶

A real danger which existed from use of attainders was the lack of impartiality on the part of persons comprising both judge and jury. Political passions and influence were the dominant authorities in these legislative trials.⁶⁷

ascribes to it. In sum, the meaning of a particular resolution of censure will largely depend on the importance Congress attaches to it.

⁶² See U.S. CONST. art. I, § 9, cl. 3.

⁶³ See *Brown*, 381 U.S. at 441; JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 586, 621, 688, 706, 728-29, 755 (E. H. Scott ed., 1893).

⁶⁴ See generally *Cummings*, 71 U.S. at 320-25 (relating some of the English experiences with bills of attainder and holding that required test oaths under the Missouri State Constitution violated the Attainder Clause).

⁶⁵ *Id.*

⁶⁶ 4 WILLIAM BLACKSTONE, COMMENTARIES *44.

⁶⁷ See *Brown*, 381 U.S. at 443-46; 1 COOLEY, CONSTITUTIONAL LIMITATIONS 536-37 (8th ed. 1927); 3 JOHN C. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1868) (citing Alexander Hamilton). Macaulay describes a particularly vivid account of this danger in describing the attainder of Sir John Fenwick:

Some hundreds of gentlemen, every one of whom had much more than half made up his mind before the case was open, performed the office both of judge and jury. They were not restrained, as a judge is restrained, by the sense of responsibility. . . . They were not selected, as a jury is selected, in a manner which enables a culprit to exclude his personal and political enemies. The arbiters of the prisoner's fate came in and went out as they chose. They heard a fragment here and thereof what was said against him, and a fragment here and there of what was said in his favor. During the progress of the bill they were

As Justice Story stated, “[b]ills of this sort, have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.”⁶⁸

As to the punishments, many consisted of loss of life; if the punishment was short of death, the attainder was a “bill of pains and penalties.”⁶⁹ In addition, the sentence carried with it a “corruption of blood,” which meant that the attainted person’s heirs could not inherit his property.⁷⁰ Either punishment is prohibited by the Constitution.⁷¹ In 1810, Chief Justice Marshall stated that “a Bill of Attainder may affect the life of an individual, or may confiscate his property, or may do both.”⁷² Blackstone described some of the English punishments as consisting of “exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands, or movables . . . others induce a disability of holding offices or employments . . .”⁷³ However, the American definition of punishments was not limited to a narrow technical interpretation.

B. *The Framers’ Intent*

The Framers were adamant against the use of Bills of Attainder, seeing the issue through the lens of separation of powers. As previously mentioned, there was no debate during the Convention over its prohibition despite the Framers’ almost constant disagreement over most aspects of the Constitution. James Madison aptly wrote that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”⁷⁴

The doctrine of separation of powers has been implemented by constitutional

exposed to every species of influence. One member might be threatened by the electors of his borough with the loss of his seat. . . . In the debates arts were practised and passions excited which are unknown to well-constituted tribunals, but from which no great popular assembly divided into parties ever was or ever will be free.

Brown, 381 U.S. at 445 n.19 (citing 9 LORD MACAULAY, HISTORY OF ENGLAND FROM THE ASSESSION OF JAMES I at 207 (Charles Harding Firth ed., 1914)).

⁶⁸ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1344 (5th ed. 1994).

⁶⁹ *Cummings*, 71 U.S. at 323.

⁷⁰ *Brown*, 381 U.S. at 441.

⁷¹ *See id.* at 447 (1965); *Cummings*, 71 U.S. at 323.

⁷² *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810).

⁷³ BLACKSTONE, *supra* note 66, at *377.

⁷⁴ THE FEDERALIST, NO. 47, at 324 (James Madison) (Jacob E. Cooke, ed. 1961).

provisions which either grant power or forbid its use to certain branches of the government. A fine example is Article III's grant of "the Judicial Power of the United States,"⁷⁵ which has been interpreted to grant exclusive authority to certain areas while forbidding its use in others.⁷⁶ In this manner are our liberties preserved from autocratic and tyrannical rule.

History is replete with examples of the Executive Department overstepping its bounds of authority, but our Constitution's Framers were most concerned with the power of the Legislative Branch. There was great fear that the legislature would supersede its granted authority and assume the powers of the other departments, thereby depriving the people of their liberties.⁷⁷ As Madison noted, "in a representative republic . . . where the legislative power is exercised by an assembly . . . which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the object of its passions," certain barriers were necessary in order to keep it within its intended sphere of action.⁷⁸ The prohibition against bills of attainder was expressly included in order to be such a barrier.⁷⁹

⁷⁵ U.S. CONST. art. III, § 1.

⁷⁶ See *Commodity Future Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (determining that Article III "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances'"); see also Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 711 (1997) (noting that "[i]n fact, the Framers specifically rejected a proposal that would have given Congress control over the judicial power").

⁷⁷ Alexander Hamilton remarked upon this in *The Federalist* when he stated that "[t]he propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already more than once suggested." THE FEDERALIST NO. 73, at 494 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

⁷⁸ See THE FEDERALIST NO. 48, at 334 (James Madison) (Jacob E. Cooke, ed. 1961).

⁷⁹ See HAMILTON, *supra* note 67, at 34-35. John Hamilton quoted Alexander Hamilton as saying:

Nothing is more common . . . than for a free people, in times of passion, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise a number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.

Id.; see also THE FEDERALIST NO. 44, at 301-02 (James Madison) (Jacob E. Cooke, ed. 1961).

Bills of attainder invariably arise from the heated passions of the day; majorities in the public are apt to ignore future consequences in pursuit of expedient solutions to problems which may or may not exist. Short term problems are resolved for those not affected by the attainting, but the Framers recognized that the pendulum inevitably swings back, encapturing those in the same snare they before thought wise. For this very reason Madison remarked that bills of attainder are "contrary to the first principles of the social compact, and to every principle of sound legislation."⁸⁰ Madison then remarked upon the experience American citizens had undergone with the use of bills of attainder, stating that "[t]hey have seen with regret and with indignation that... legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community."⁸¹ It is readily apparent that the prospect of censure has indeed proven Madison correct; recent supporters of censure were "enterprising" in thrusting an unwarranted and unconstitutional red herring into the impeachment arena, "snar[ing]... the... less informed part of the community."⁸²

Most important, it is evident that the Framers considered the prohibition against bills of attainder to extend to congressional punishments of the President. During the debates over the Impeachment Clause, George Mason was the driving force behind its adoption.⁸³ In arguing for the necessity of the Impeachment Clause's inclusion in the Constitution, Mason pointed out that "[a]s [B]ills of [A]ttainder... are forbidden, it is the more necessary to extend the power of impeachments."⁸⁴ Moreover, the prohibition on attainting the President was implicitly confirmed in *Nixon v. Administrator of General Services*,⁸⁵ in which the Supreme Court considered and rejected a challenge by former President Richard Nixon that a congressional Act calling for the preservation of his

⁸⁰ THE FEDERALIST No. 44, at 301 (James Madison) (Jacob E. Cooke, ed. 1961).

⁸¹ *Id.* at 207–08.

⁸² *Id.*

⁸³ See 5 JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787 at 147, 340, 528–29 (Jonathan Elliot ed. 1941) [hereinafter 5 ELLIOT'S DEBATES]. In arguing for inclusion of an impeachment clause in the Constitution, Mason stated that "[n]o point is of more importance than that the right of impeachment should be continued. Shall any man be above justice? Above all, shall that man be above it who can commit the most extensive injustice?" *Id.* at 340. Moreover, it was Mason who was largely responsible for the words stated in the impeachment clause which are debated to this day, "high crimes and misdemeanors." *Id.* at 528.

⁸⁴ *Id.* In addition, no one at the Convention argued that the Attainder Clause should not apply to the President. Taken as a whole, this is persuasive authority that the Framers originally intended impeachment and removal as the only means for addressing presidential misconduct.

⁸⁵ 433 U.S. 425 (1977).

presidential materials and papers violated the Attainder Clause.⁸⁶ The challenge was rejected because the Act did not violate the clause, not because Presidents are excepted from the Attainder prohibition.⁸⁷ Thus, Presidents have the same right to be free from Bills of Attainder as do ordinary citizens.

C. Censure as a Bill of Attainder

From an objective viewpoint, congressional censure of the President appears to fit all the criteria of a prohibited Bill of Attainder. However, in order to accurately make this determination, analysis of Supreme Court jurisprudence is required. In particular, the determinative issue is whether censure is intended as a punishment.

1. A Jurisprudential Analysis

Set against this constitutional prohibition, Congress is barred from passing "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."⁸⁸ Thus, Congress may not single out individuals and cut off their compensation and thereafter bar them from government service.⁸⁹ Doing so, said the Supreme Court, "stigmatize[s] their reputation and seriously impair[s] [the individuals'] chance to earn a living."⁹⁰ In addition, states may not require an "oath of loyalty" as a condition precedent to holding certain jobs, that a person has not committed certain designated acts during the time of a rebellion.⁹¹ Such an act is a "legislative act which inflicts punishment without a judicial trial."⁹² Punishment, said the Supreme Court, is not limited to those instances which deprive a person of "life, liberty, or property."⁹³ Included under the Attainder protections are "freedom from outrage on the feelings as well as restraints on the person."⁹⁴

⁸⁶ See *id.* at 484.

⁸⁷ See *id.* at 468-84. In fact, the government did not even argue that the clause does not apply to the President. See *id.*

⁸⁸ *United States v. Lovett*, 328 U.S. 303, 315 (1946).

⁸⁹ See *id.* Congress had condemned the three persons as "irresponsible, unrepresentative, crackpot, radical bureaucrats" who were "affiliates of communist front organizations." See 89 CONG. REC. 479 (1943).

⁹⁰ *Lovett*, 328 U.S. at 314.

⁹¹ See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866) (holding that a Missouri constitutional provision depriving persons of lawful profession upon failure to take a proscribed loyalty oath violated the Bill of Attainder Clause of Constitution).

⁹² *Id.* at 323.

⁹³ *Id.* at 320.

⁹⁴ *Id.*

Another Supreme Court case concerning Bills of Attainder, *Nixon v. Administrator of General Services*,⁹⁵ is also pertinent to this issue. Concerned that recently resigned President Richard Nixon might attempt to destroy certain presidential materials which he had attempted to appropriate,⁹⁶ Congress passed a law ordering the General Services Administration to retain control over the records.⁹⁷ Nixon challenged the Act, arguing, inter alia, that the Act was a Bill of Attainder.⁹⁸ He argued that Congress passed the Act believing "that he had engaged in misconduct . . . and generally was deserving of a legislative judgment of blameworthiness."⁹⁹ The Supreme Court disposed of Nixon's argument because it could find no evidence that the statute was intended to punish or penalize him.¹⁰⁰

In so finding, the Court employed a four-part analysis in order to determine whether the statute was punitive.¹⁰¹ First, the Court reviewed the "infamous history" of Bills of Attainder in order to determine whether the Act was of a punitive nature. Beginning with English history, the Court reviewed American experience with Attainder, concluding that Nixon had suffered none of "these forbidden deprivations at the hands of Congress."¹⁰² Although Nixon had been deprived of property, the statute provided for "just compensation"—therefore the statute did not punitively confiscate his property.¹⁰³ Thus, there was no feature of the Act which fell under the historical meaning of legislative punishment.¹⁰⁴

⁹⁵ 433 U.S. 425 (1977).

⁹⁶ See *id.* at 476.

⁹⁷ See *id.* at 475.

⁹⁸ See *id.* at 468. Nixon also argued, unsuccessfully, that the Act violated the principle of separation of powers, presidential privilege, his privacy interests, and his First Amendment association rights. See *id.* at 429.

⁹⁹ *Id.* at 468. In a footnote, the Court noted, significantly, that "a legislative denunciation and condemnation of an individual often act[s] to impose [forbidden] retroactive punishment." *Id.* at 468 n.30.

¹⁰⁰ See *id.* at 476.

¹⁰¹ See *id.* at 473–84. The Court went on to state that "[i]n judging the constitutionality of the Act, we may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect." *Id.* at 484.

¹⁰² *Id.* at 475. American experience with Attainder includes a barring of Communist Party members from holding offices in labor unions. See *United States v. Brown*, 381 U.S. 437 (1965); see also *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (striking down a loyalty oath required of attorneys before they could practice law as a Bill of Attainder because it acted as "a legislative decree of perpetual exclusion" from a lawful profession). But see *Fleming v. Nestor*, 363 U.S. 603, 619 (1960) (holding that Social Security Act provision terminating the benefits of aliens who are deported did not constitute a Bill of Attainder because there was no "evidence of punitive intent").

¹⁰³ See *Nixon v. Administrator of General Services*, 433 U.S. 425, 475 (1977).

¹⁰⁴ See *id.*

Second, the Court applied a functional test to determine the existence of punishment, "analyzing whether the law . . . viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."¹⁰⁵ If legitimate legislative purposes do not appear, the Court will find it "reasonable to conclude" that punishment of affected individuals was the purpose of the legislature.¹⁰⁶ This inquiry is necessary because there is always the possibility that new punishments might be designed by the legislature which offend the Bill of Attainder guarantee.¹⁰⁷ The Court noted two facets of the law affecting Nixon which furthered nonpunitive legitimate legislative ends. First, Congress had the right to act to preserve materials which could aid in prosecution of Watergate-related crimes; the threat of destruction of these materials was expressly contemplated because of an agreement Nixon had entered into.¹⁰⁸ Second, the Court found a legitimate public interest in access to presidential materials; the materials' general historical importance coupled with an unbroken precedent of voluntary presidential surrender of such records made their preservation "of great value to the political health and vitality of the United States."¹⁰⁹ Furthermore, the Act itself explicitly referred to these legitimate purposes, thereby strengthening the implication that there was not a punitive intent.¹¹⁰

The third test for determining an act's punitive intent is to inquire into the legislative record.¹¹¹ The Court found no legislative history leading to the conclusion that Congress intended to punish Nixon; both the Senate and House Committee Reports expressed no intent to penalize him, and the only legislative

¹⁰⁵ *Id.* at 475-76.

¹⁰⁶ *Id.* at 476.

¹⁰⁷ *See id.* at 475.

¹⁰⁸ *See id.* at 476-77.

¹⁰⁹ *Id.* at 450, 476-78.

¹¹⁰ *See* 44 U.S.C. § 2107 (current version at 44 U.S.C. § 2111 (1994); *see also* *Nixon*, 433 U.S. at 477 n.41 (citing S. REP. NO. 93-1181, at 4 (1974)). The Senate report stated:

(1) To begin with, prosecutors, defendants, and the courts probably would be deprived of crucial evidence bearing on the defendants' innocence or guilt of the Watergate crimes for which they stand accused. (2) Moreover, the American people would be denied full access to all facts about the Watergate affair, and the efforts of Congress, the executive branch, and others to take measures to prevent a recurrence of the Watergate affair may be inhibited.

Id.

¹¹¹ *See Nixon*, 433 U.S. at 478; *Trop v. Dulles*, 356 U.S. 86, 96 (1958) (stating that "[i]n deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others . . . it has been considered penal").

history expressing intent was that indicating the regulative character of the Act.¹¹² Significantly, there were no “aspersions on [Nixon’s] personal conduct and . . . no condemnation of his behavior as meriting the infliction of punishment.”¹¹³ In fact, when the specter of attainder was raised in the Senate, the bill’s sponsor emphatically denied any intent to punish Nixon.¹¹⁴ Furthermore, the absence of punitive congressional sentiments “largely undercut[] a major concern that prompted the [B]ill of [A]ttainder prohibition: the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob.”¹¹⁵ Strengthening this conclusion was the fact that Congress, in passing the statute, expressly provided for its judicial review.¹¹⁶

Finally, the Court looks into whether less burdensome alternatives exist “by which that legislature . . . could have achieved its legitimate non-punitive objectives.”¹¹⁷ In *Nixon*, the Court found the Act to be a reasonable method for securing its desired ends: protection of evidence and historical materials.¹¹⁸ The Act, the Court reasoned, might very well have been the least burdensome method by which to gain Nixon’s cooperation in the preservation of the presidential materials.¹¹⁹

Rudimentary scrutiny of any censure resolution inevitably leads to the conclusion that it is a Bill of Attainder. First, censure is undoubtedly a legislative act; second, it applies to a named individual. Although there is a trial involved, it is not judicial.¹²⁰ Nearly every Attainder will be accompanied by some form of trial, whether it be one involving aspects of due process or simply a sham. The more crucial inquiry must be made concerning censure’s punitive nature.

Applying the Supreme Court’s four-step analysis in *Nixon* clearly demonstrates that censure is of a punitive nature. As to the first part of the *Nixon* test, there is judicial precedent characterizing censure as a Bill of Attainder. In *United States v. Brown*,¹²¹ the Supreme Court struck down as a Bill of Attainder a statute which made it a crime for a member of the Communist Party to serve as an

¹¹² See *Nixon*, 433 U.S. at 478.

¹¹³ *Id.* at 479.

¹¹⁴ Senator Ervin stated that “[t]his bill does not contain a word to the effect that Mr. Nixon is guilty of any violation of the law. It does not inflict any punishment on him.” 120 CONG. REC. 33959 (1974).

¹¹⁵ 433 U.S. at 480.

¹¹⁶ See *id.* at 481–82.

¹¹⁷ *Id.* at 482.

¹¹⁸ See *id.* at 478–79.

¹¹⁹ See *id.* at 483.

¹²⁰ For a discussion on censure’s resemblance, or lack thereof, to impeachment, see *infra* Part IV. A.

¹²¹ 381 U.S. 437 (1965).

officer or employee of a labor union.¹²² The Court, in distinguishing the statute at issue from a previously upheld one, noted that the upheld statute "incorporate[d] no judgment censuring or condemning any man or group of men."¹²³ Because the statute at issue did incorporate, in part, such a judgment of censure and condemnation, it was struck down.¹²⁴

In addition, there is illuminating precedent in a failed censure resolution which Congress attempted to enact in 1794. The censure resolution did no more than declare that certain specified persons were involved in an insurrection.¹²⁵ James Madison objected, stating "[i]t is in vain to say that this indiscriminate censure is no punishment. If it falls on classes, or individuals, it will be a severe punishment Is not this proposition, if voted, a vote of attainder?"¹²⁶ Even the censure resolution's supporters did not argue about the resolution's punitive nature; they simply countered that the resolution applied to a general group, none by name.¹²⁷ The resolution went to defeat, seventy-three votes to nineteen,¹²⁸ with Madison's views a focus of the debate.¹²⁹

The second step of the *Nixon* test also demonstrates the punitive nature of censuring the President. Censure cannot "reasonably" be said to "further non-punitive legislative purposes."¹³⁰ Unlike in *Nixon*, there exists no need to preserve evidence or historical materials; censure is punishment of an individual, constitutionally unsanctioned in the absence of an express authority. In this manner, the process of impeachment and removal from office is a constitutionally sanctioned Bill of Attainder.¹³¹ It may be argued that censuring the President

¹²² See *id.* at 462.

¹²³ *Id.* at 453-54.

¹²⁴ See *id.*

¹²⁵ See 4 ANNALS OF CONG. 932 (1794). The censure resolution read in part as follows:

In tracing the origin and progress of the insurrection, we can entertain no doubt that certain combinations of men, careless of consequences and disregarding the truth, by disseminating suspicions, jealousies, and accusations, of the Government, have had all the agency you [then President Washington] ascribe to them, in fomenting this daring outrage against social order and the authority of the laws.

Id.

¹²⁶ *Id.* at 934.

¹²⁷ See *id.* at 938 (remarks of Sen. Dexter stating that "it is punishment in the abstract, without an object punished").

¹²⁸ *Id.* at 945.

¹²⁹ See *id.* at 932-45.

¹³⁰ *Nixon v. Administrator of General Services*, 433 U.S. 425, 475-76 (1977).

¹³¹ See U.S. CONST. art. II, § 4; 2 RECORDS OF THE FEDERAL CONSTITUTION, *supra* note 6, at 64-69. For example, Benjamin Franklin stated that "[i]t would be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused." *Id.* at

justly stems from the power of impeachments, but this issue will be discussed in Part IV.A; what is important for present purposes is that censure is in fact a punishment. Censure's punitive nature is therefore strengthened not only by its asserted proximity to impeachment, but by its lack of legitimate legislative purpose.

The conclusion that censure serves no purpose other than to punish an allegedly blameworthy or guilty President is reinforced by the congressional practice of censuring its own members. Article 1, § 5, clause 2 of the Constitution gives each house of Congress the power to "punish its Members for disorderly Behavior."¹³² Through this power Congress has censured its own members.¹³³ Furthermore, this power has been described by the Supreme Court as a "judicial power,"¹³⁴ thereby adding to the conclusion that censuring the President is attainting him. If Congress is censuring its members under its express power to punish them, then, *a fortiori*, censure of the President is punishment as well.

Current members of Congress who considered the impeachment articles against President Clinton were readily aware of the punitive nature of censuring the President. Under the third step of the *Nixon* test, searching the legislative record, there can be no other conclusion than that censure is intended as punishment. Censure proponents in the House Judiciary Committee, on numerous occasions, referred to censure as the best means by which to punish the President. For example, Congressman Martin Meehan, a Democrat supporter of censuring the President, stated in favor of such a resolution that it is intended as a punishment: "If you want to punish the President, or brand the President with a scarlet letter or stamp him on his forehead, censure is the way to do that."¹³⁵ Floor

65; see also Note, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and its Use in the Lovett, Trop, Perez, and Speiser Cases*, 34 IND. L.J. 231, 236 (1959).

¹³² U.S. CONST. art. I, § 5, cl. 2.

¹³³ See, e.g., *Senate Election, Expulsion, and Censure Cases, from 1789 to 1960*, S. DOC. NO. 87-71 at 94-97 (1962). Senators John L. McLaurin and Benjamin R. Tillman of South Carolina were censured for a fight on the Senate floor. The Senate document noted that "[t]he penalty, thus, was censure and suspension for 6 days—which had already elapsed since the assault." *Id.* at 96.

¹³⁴ *Kilbourn v. Thompson*, 103 U.S. 168, 169 (1880) (holding that Congress had no power to declare a witness in contempt for refusing to answer questions concerning his business).

¹³⁵ *Impeachment Inquiry: William Jefferson Clinton, President of the United States, Consideration of Articles of Impeachment: Hearings Before the House Judiciary Comm.*, 105th Cong., 2d Sess. 532 (1998) available in 1998 WL 857390 (statement of Representative Meehan); see also *id.* at 630 (statement of Representative Wexler's) (stating that "censure is the scarlet letter"); *id.* at 636 (statement of Representative Frank) (stating that "[h]ow do we get a vote that expresses condemnation? One choice is . . . censure"), *id.* at 639 (statement of Representative Schumer) (stating that censure is the "right punishment" for President Clinton); *id.* at 698 (statement of Representative Rothman) (stating that "I feel it incumbent upon myself . . . to prove . . . the president can't lie to us, he cannot behave dishonorably in our White

debates in the full House unequivocally express the same intent, to punish the President, a power expressly forbidden to Congress under the attainder clause.¹³⁶ House Minority leader Richard Gephardt stated that he felt Congress should "penaliz[e] this President with censure and not impeachment."¹³⁷

Unlike the *Nixon* case, where Congress evinced no intent to punish Nixon for his blameworthiness,¹³⁸ the only recognizable intent found in the debates over the censure of President Clinton is to punish. The *Nixon* Court specifically found that the available legislative history surrounding the Act to reclaim Nixon's Presidential materials "cast no aspersions on [Nixon's] personal conduct and contain[ed] no condemnation of his behavior as meriting the infliction of punishment."¹³⁹ The legislative record pertaining to President Clinton's proposed censure invokes a major concern which prompted the inclusion of the attainder clause in the Constitution, "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge"¹⁴⁰ This is exemplified in Minority Leader Gephardt's remarks that Republicans were denying Democrats a chance to act on public opinion by not allowing a vote on censure: "I believe the majority is . . . disregarding . . . the wishes of a vast majority of the American people regarding penalizing this President with censure"¹⁴¹ Moreover, unlike in *Nixon*, Congress never provided for judicial review to protect any legal or constitutional rights President Clinton might have regarding being censured.¹⁴²

House and not be punished . . . and that's why I support these grounds for censure.").

¹³⁶ U.S. CONST. art. I, § 9, cl. 3 ("[N]o Bill of Attainder or ex post facto Law shall be passed.").

¹³⁷ 144 CONG. REC. H11,778 (daily ed. Dec. 18, 1998) (statement of Rep. Gephardt). Numerous other examples abound which are determinative of Congressional intent to punish, but only a few examples should be necessary to demonstrate this intent. *See id.* at H11,779 (statement of Rep. Mendez) (stating that "[a] censure would put an indelible scar upon the President's place in history, something we all know this President cares about deeply. It is a tough, just, and appropriate punishment"); *id.* at H11,785 (statement of Judiciary Committee member Rep. Schumer) (stating that "the proper punishment is censure, not impeachment"); *id.* at H11,803 (statement of Rep. Hall) (stating that "[c]ensure is a harsh enough punishment. It expresses the profound disappointment of the American people, and it will stay with the President for the rest of his life and throughout history"); *id.* at H11,813 (statement of Rep. Obey) (stating that "to those who say censure has no bite, my response is this: I come from the State of Joe McCarthy. Tell him censure has no bite. It destroyed him"); *id.* at H11,818 (statement of Rep. Holden) (stating that "the President should be punished and should be censured"); *id.* at H11,833 (statement of Rep. Doggett) (stating that that Congress should "[p]unish the President with a punishment that fits the crime Censure and move on").

¹³⁸ *See Nixon v. Administrator of General Services*, 433 U.S. 425, 479 (1977).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 480.

¹⁴¹ 144 CONG. REC. H11,778 (daily ed. Dec. 18, 1998) (statement of Rep. Gephardt).

¹⁴² *See Nixon*, 433 U.S. at 480-82.

The final step in the *Nixon* test is whether less burdensome alternatives exist whereby Congress can achieve its legitimate nonpunitive objectives.¹⁴³ This aspect of the *Nixon* test is certainly less relevant here, since no other objectives could have existed except to punish President Clinton. In fact, censure was proposed as an alternative to impeachment, a procedure expressly provided to judge the President's guilt or innocence. This asserted judicial character of a censure resolution strengthens the conclusion that it is a Bill of Attainder.

2. Censure as a "Scarlet Letter"¹⁴⁴

Aside from a jurisprudential analysis of the Bill of Attainder clause, it is possible to determine whether censure has a punitive nature through comparative means. Do the effects of a censure mirror any common punishments seen during early or present American history? Moreover, do the purposes that censure is meant to serve comport with traditional aims of punishment, namely retribution and deterrence? This Section argues that censure has the effect of shaming or stigmatizing its recipient.

Shaming punishments began in this country during colonial America.¹⁴⁵ Such punishments included the stocks and pillories, often accompanied by an order that the criminals bear a sign designating their offenses,¹⁴⁶ forced public apologies,¹⁴⁷ the ducking stool,¹⁴⁸ the bilbo,¹⁴⁹ public whippings,¹⁵⁰ and, of

¹⁴³ See *id.* at 482.

¹⁴⁴ The term "scarlet letter" is based on Nathaniel Hawthorne's famous novel, in which the heroine, Hester Prynne, is forced to wear a scarlet "A" on her dress which proclaims her an adulteress. See NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 57 (St. Martin's 1991) ("[T]he point which drew all eyes . . . was that Scarlet Letter.").

¹⁴⁵ See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1912-14 (1991) (discussing colonial shaming penalties); Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 804 (1999) (arguing that scarlet letter probation conditions do not violate the Eighth Amendment prohibition on cruel and unusual punishment).

¹⁴⁶ See Massaro, *supra* note 145, at 1913; Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1361 (stating that "[t]he stocks and pillory inflicted primarily psychological rather than physical punishment.").

¹⁴⁷ See Massaro, *supra* note 144, at 1913.

¹⁴⁸ A common punishment device for women, the ducking stool was a seat attached to a plank which sat over water. The criminal, who was tied to the chair, would be "ducked" into the water. See Massaro, *supra* note 145, at 1914; Kelly, *supra* note 145, at 805 n. 192.

¹⁴⁹ This was an iron bar which locked together a prisoner's legs with two sliding shackles. See Massaro, *supra* note 145, at 1913-14.

¹⁵⁰ See Kelly, *supra* note 145, at 804.

course, stigmatizing labels.¹⁵¹ Though largely discontinued in this country when imprisonment became the favored norm, shaming punishments have experienced a form of renaissance.¹⁵² Congressional censure of the President bears a striking resemblance to a shaming or staining punishment, adding to its nature as a Bill of Attainder.

Shaming is punishment.¹⁵³ Even those who are averse to its use recognize this truth.¹⁵⁴ Shaming is a means of expressing society's moral condemnation of an offender's actions.¹⁵⁵ In this respect, shaming punishments are similar to aspects of imprisonment, fines, and community service in that it expresses aversion to wrongs committed by imposing a penalty.¹⁵⁶ This is expressive theory, recognizing that one of the proper purposes of punishment is that of communicating to the offender and society that an act or action is opprobrious and deserving of condemnation.¹⁵⁷ Jeremy Bentham recognized this when he stated that punishment should "answer the purpose of a moral lesson":

A punishment may be said to be calculated to answer the purpose of a moral

¹⁵¹ In addition to Hawthorne's infamous scarlet letter, branding was also practiced. See Massaro, *supra* note 145, at 1913. It is this last form of shaming which concerns the author's attention in this Section. History and the public may brand the President but, consistent with the Constitution, Congress may not.

¹⁵² See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-37 (1996) (discussing the positive merits of shaming punishments). Many examples exist of recent shaming punishments. For example, a woman convicted of drug possession was ordered to stand on a street corner wearing a sign that read, "I got caught possessing cocaine. Ordered by Judge Whitfield." *Eye on America, CBS Morning News* (CBS television broadcast, May 16, 1997). A man convicted of driving while intoxicated was ordered to paste a bumper sticker to his car that read, "CONVICTED: DWI." *People v. Letterlough*, 655 N.E.2d 146, 147 (N.Y. 1995). For a comprehensive exposition on various shaming punishments, see generally Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998).

¹⁵³ See *E.B. v. Veniero*, 119 F.3d 1077, 1099 (3d Cir. 1997) (stating that colonial shaming practices "inflicted punishment because they either physically held the person up before his or her fellow citizens for shaming or physically removed him or her from the community."); Garvey, *supra* note 152, at 737 ("[T]hese punishments expose the offender to public view and heap ignominy upon him..."); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 384 (1997) ("[T]hese punishments convey condemnation in dramatic and unequivocal terms"); Kahan, *supra* note 152, at 631-35 ("[S]haming penalties... express appropriate moral condemnation."); Massaro, *supra* note 145, at 1886 (stating that shaming techniques are "penalties"); Kelly, *supra* note 145, at 809 ("[C]ommentators... agree that the new shaming techniques are a form of punishment...").

¹⁵⁴ See James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1057-59 (1998) (acknowledging that shaming can be justified under traditional theories of punishment, but seeing shaming as "a species of official lynch justice.").

¹⁵⁵ See Kahan, *supra* note 153, at 384.

¹⁵⁶ See Kelly, *supra* note 145, at 809 n. 220.

¹⁵⁷ See Kahan, *supra* note 153, at 594.

lesson, when, by reason of the ignominy it stamps upon the offen[se], it is calculated to inspire the public with sentiments of aversion towards those pernicious habits and dispositions with which the offence appears to be connected; and thereby to inculcate the opposite beneficial habits and dispositions.¹⁵⁸

A censure of the President falls neatly into the expressive theory of punishment and, more specifically, can be seen as a shaming punishment. Censure expresses Congress' condemnation and rebuke of whatever actions happen to be the target of the censure.¹⁵⁹ It expresses the legislature's viewpoint, as the people's representatives, that the President is worthy of blameworthiness and is guilty of some act which must be conveyed to society as wrong.¹⁶⁰ Censure, like other shaming penalties, will "[inflict] disgrace and contumely in a dramatic and spectacular manner."¹⁶¹

Censure, in essence, is a stigmatization or stain on the President. Clearly, Presidents value their legacies; history's judgment is important to them. The "scarlet letter" of being censured is something that will never be erased from history.¹⁶² This eternal stain on a Presidency will never be forgotten, a fact pointed out by censure proponents in the House during the debates over censuring President Clinton.¹⁶³ Andrew Jackson felt that this stain was the most painful punishment Congress could prescribe:

¹⁵⁸ JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 171 (J.H. Burns & H.L.A. Hart eds., The Athlone Press 1970).

¹⁵⁹ This sense of condemnation and rebuke was a recurring theme during the House debates on President Clinton's censure. For example, Representative Bonior stated that: "The American people are looking for a solution that condemns the President's wrongdoing . . ." 144 CONG. REC. H11,779 (daily ed. Dec. 18, 1998); Representative Menendez stated that he believed "the President's actions were reprehensible and worthy of condemnation." *Id.*

¹⁶⁰ Though few dispute the wrongful nature of President Clinton's actions, it must be remembered that some acts which might be potential targets of censure will be either so arcane as to not be well understood by the public, such as Andrew Jackson's Bank War, *see supra* Part II, or will command such a split in public opinion as to the wrongfulness of the act that congressional resolution of its blameworthiness will carry great weight.

¹⁶¹ *Goldschmitt v. State*, 490 So.2d 123, 125 (Fla. Dist. Ct. App. 1986) (citing *United States v. William Anderson Co.*, 698 F.2d 911, 913 (8th Cir. 1983)).

¹⁶² Recall that although Andrew Jackson's censure was subsequently expunged, history has certainly taken note of its occurrence and it is likely that most accounts focus more on the actual censure than its expungement.

¹⁶³ *See supra* notes 135-37 and accompanying text.

[T]hough neither removal from office nor future disqualification ensues, yet it is not to be presumed that the framers of the Constitution considered either or both of those results as constituting the whole of the punishment they prescribed. The judgment of *guilty* by the highest tribunal in the Union, the stigma it would inflict on the offender, his family, and fame, and the perpetual record on the Journal, handing down to future generations the story of his disgrace, were doubtless regarded by them as the bitterest portions, if not the very essence, of that punishment.¹⁶⁴

This stigma, as recognized by Blackstone, was a hallmark characteristic of being attainted: "He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation."¹⁶⁵

Thus, there can be no doubt that censure of a President is a Bill of Attainder. Censure is a "legislative act which inflicts punishment without a judicial trial."¹⁶⁶ It is clearly punishment. It has been historically considered as punishment,¹⁶⁷ no alternative legitimate regulatory or legislative purpose exists for its use,¹⁶⁸ congressional intent is clearly of a punitive nature,¹⁶⁹ and the penalty prescribed is eternal stigma.¹⁷⁰ An attainted President is forced to bear the scarlet letter "C" in history as deserving of condemnation and of a judgment of blameworthiness and guilt. Most important, the Framers expressly spoke to the issue of attainting the President and decided to forbid its use.¹⁷¹

IV. OTHER CONSTITUTIONAL PROBLEMS

A. *A Lack of Constitutional Basis*

In addition to violating the attainder clause, censure lacks an express constitutional basis. Congress is expressly granted the plenary power to "punish its Members for disorderly Behav[ior], and with the Concurrence of two thirds, expel a Member."¹⁷² The bifurcated power of impeachment in the House¹⁷³ and trial in the Senate¹⁷⁴ also grants Congress the power to expel a President.

¹⁶⁴ 3 PAPERS OF THE PRESIDENTS, *supra* note 13, at 1294.

¹⁶⁵ 4 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES *380.

¹⁶⁶ *Cummings v. State of Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866).

¹⁶⁷ See *supra* notes 121-31 and accompanying text.

¹⁶⁸ See *supra* notes 129-36 and accompanying text.

¹⁶⁹ See *supra* notes 135-45 and accompanying text.

¹⁷⁰ See *supra* discussion Part III.C.2.

¹⁷¹ See 5 ELLIOT'S DEBATES, *supra* note 82, at 528.

¹⁷² U.S. CONST. art. I, § 5, cl. 2. Congress has exercised this power to punish its own members through the use of censure. See *supra* notes 132-34 and accompanying text.

¹⁷³ See U.S. CONST. art. I, § 2, cl. 5.

¹⁷⁴ See U.S. CONST. art. I, § 3, cl. 6.

However, the absence in the Constitution of a corresponding power to "punish [the President] for disorderly behavior" provides a negative implication that the power is not intended.

The interpretive maxim "*expressio . . . unius est exclusio alterius*" means "inclusion of one thing indicates exclusion of the other."¹⁷⁵ Relative to the power to censure a President, the maxim suggests the power was not meant to exist. This conclusion is strengthened by the Supreme Court's holding in *Kilbourn v. Thompson*.¹⁷⁶ In that case, the Supreme Court held that Congress had no power to declare a witness in contempt for refusing to answer questions concerning his business because Congress does not possess the "power of making inquiry into the private affairs of the citizen."¹⁷⁷ In so holding, the Court reasoned that "no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated in the Constitution."¹⁷⁸ Had the Framers of the Constitution intended some other means to address presidential misconduct, they would have said so in clear and intelligible language.

For this reason, recent supporters of censure have argued that the power to censure the President is incidental to the power to impeach and remove from office. To be sure, impeachment and removal from office of a President will punish him, but that is not the intended purpose of the impeachment process. The purpose of the impeachment power is to defend "the [c]ommunity [against] the incapacity, negligence or perfidy of the [C]hief Magistrate" because "either of them might be fatal to the Republic."¹⁷⁹ The power of impeachment is provided to guard the country against a President who cannot be trusted; it is a remedial mechanism, designed to cleanse and purify the office. If a President acts "in such

¹⁷⁵ WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION; STATUTES AND THE CREATION OF PUBLIC POLICIES* 638–39 (2d ed. 1995).

¹⁷⁶ 103 U.S. 168 (1880); *see also*, *United States v. Williams*, 15 F.3d 1356, 1361 (6th Cir. 1994). In *Williams*, the Sixth Circuit stated:

[A] positive ascription of power to a particular branch may be taken to imply a negative prohibition on the exercise of a similar power by the other two branches. For example, the fact that the Constitution grants the President 'power to grant reprieves and pardons for offenses against the United States' . . . implies that the other branches do not have this power.

Id.

¹⁷⁷ *Kilbourn*, 103 U.S. at 190.

¹⁷⁸ *Id.* at 192–93.

¹⁷⁹ 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6 at 64–69; SIMPSON, *supra* note 6, at 11–12. Governor Morris voiced his concern that the President "may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard against it by displacing him." *Id.* at 13.

a manner as to render [him] unworthy of being any longer trusted,"¹⁸⁰ the Constitution provides a means to replace him with another. It is the preservation of public liberties and the Constitution from an untrustworthy or dangerous President which is impeachment's mission.

Censure, on the other hand, achieves none of these purposes. It punishes the President without cleansing the office. No defense of the Constitution is served by punishing a President; no public liberties are safeguarded by its use. On the contrary, public liberties are imperiled by its existence.¹⁸¹ The threat of censure may hang over a President's head who fears more for his legacy than his principles. After being censured, a President is necessarily weakened. He is then rendered incapable of performing his job the way he did before. Congress has siphoned his power to itself and the result may be an erosion of liberties. This is so because liberty's primary safeguard, the separation of powers,¹⁸² is inevitably undermined.

B. *The Dangers of Censure*

The conclusion that an act violates the Constitution does not always prove the danger entailed in the violation. Therefore, it is necessary to reexamine the dangers sought to be avoided and the principles sought to be preserved when the attainder clause was included in the Constitution.

The inclusion of the attainder clause was intended to serve the function of separation of powers.¹⁸³ The fundamental danger sought to be avoided was the legislative assumption of judicial powers.¹⁸⁴ A censure of the President carries with it all of the inequities and dangers which originally prompted the inclusion of the attainder clause in the Constitution. First, legislative trials do not possess the normal forms and safeguards inherent in a judicial trial.¹⁸⁵ In the absence of formal due process, a President is likely to be confronted with procedural irregularities and inequities he cannot prepare for or defend against. For example, the President's accusers are likely to be both the judge and jury at his trial. The fundamental fairness ordinary citizens expect at trial would be subsumed by what is likely to be a majority bent on exacting a political price on the President. Any expectation that due process would direct the trial is extinguished by the reality that the Congress is already subverting the Constitution through consideration of the attainder.

¹⁸⁰ THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

¹⁸¹ This theme is more fully developed in the next section. See *infra* discussion Part IV.B.

¹⁸² See THE FEDERALIST No. 51, at 347-48 (James Madison) (Jacob E. Cooke, ed. 1961).

¹⁸³ See *United States v. Brown*, 381 U.S. 437, 442 (1965).

¹⁸⁴ See *id.*

¹⁸⁵ See *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977); *Brown*, 381 U.S. at 445 (1965); *Cummings v. State of Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866).

Second, and most dangerous, is the fact that Congress, in hearing the charge, might be too concerned with the popular passions and clamor of its constituents to impartially try the accused.¹⁸⁶ There is little political risk in condemning and branding a President lacking in popular support; a far greater political peril exists for those legislators who ignore public opinion. Moreover, can it be doubted that an antagonistic majority party would forsake the opportunity of weakening a political opponent? Minor considerations such as the guilt or innocence of the accused President will inevitably be ignored for partisan purposes. For these reasons, "no judicial power is vested in the Congress . . . save in the cases specifically enumerated."¹⁸⁷

Unfortunately, an attainder of the President carries with it a far greater danger to this country: legislative encroachment on the executive branch. As noted by the Supreme Court, "the principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787."¹⁸⁸ This principle is manifestly important because, as stated by James Madison in *The Federalist*, the "separate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty."¹⁸⁹

Essential to the separation of powers is the power and ability of the Executive Branch to perform its intended functions and withstand encroachment by the other branches. Without this ability, another branch, formerly coequal, can seize power which may unsettle the foundations of our government, inherently tending towards tyranny.¹⁹⁰ Alexander Hamilton eloquently described the necessary ingredient to maintain this equilibrium when he stated in *The Federalist*:

¹⁸⁶ See *Nixon*, 433 U.S. at 469, 480; *Brown*, 381 U.S. at 443–46; *Cummings*, 71 U.S. at 323; *STORY*, *supra* note 68, at § 1344. As was stated in *Brown*:

[T]he Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.

Brown, 381 U.S. at 445.

¹⁸⁷ *Kilbourn v. Thompson*, 103 U.S. 168, 192–93 (1880).

¹⁸⁸ *INS v. Chadha*, 462 U.S. 919, 945–46 (1983) (invalidating the "legislative veto" as unconstitutional under separation of powers principles); see also, *New York v. United States*, 505 U.S. 144, 181–82 (1992) (holding that states cannot "consent" to the enlargement of Congressional power); *Nixon*, 433 U.S., at 443 (1977); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629–30 (1935) (holding that Congress has the authority to prescribe causes for removal by the President of members of the Federal Trade Commission).

¹⁸⁹ *THE FEDERALIST* NO. 51, at 348 (James Madison) (Jacob E. Cooke, ed. 1961).

¹⁹⁰ See *MONTESQUIEU, THE SPIRIT OF THE LAWS* 151–52 (Thomas Nugent trans., 1949); *JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW* 121 (3d ed., 1986).

Energy in the executive is a leading character in the definition of good government. It is essential to the protection . . . against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and highhanded combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, faction, and of anarchy.¹⁹¹

Without this "energy," Presidents become bit players in the business of running the government; liberties formerly guarded by the Executive Branch may crumble in the absence of power to preserve them; foreign policy may suffer because the President lacks "energy" to direct it; law enforcement efforts may be undermined by society's realization that there is little ability to enforce the law. In short, a lack of appropriate power in the Executive Branch is a danger to be prevented.

The branch of government the Framers were most concerned would enervate Executive "energy" was the Legislative Branch.¹⁹² In accordance with this fear, it was the Framers' "profound conviction" that Congress's powers "were the powers to be most carefully circumscribed."¹⁹³ The specter of censure enlarges Congress's power by allowing it the power to punish the President, a power surely not granted conversely to the President to punish members of Congress. Already, each house of Congress has the bifurcated power of impeachment or removal, a power the Framers feared would weaken the Presidency too much by itself.¹⁹⁴ However, at least in theory and regardless of the President's ultimate guilt or innocence, the process of impeachment would be an act of cleansing the

¹⁹¹ THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

¹⁹² As stated by Alexander Hamilton:

The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated by examples in some preceeding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seems sometimes to fancy, that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter . . . They often appear disposed to exert an imperious control over the other departments; and . . . make it very difficult for the other members of the government to maintain the balance of the constitution.

THE FEDERALIST NO. 71, at 483-84 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

¹⁹³ *Chadha*, 462 U.S. at 947.

¹⁹⁴ James Madison felt that the inclusion of the impeachment clause in the Constitution was necessary but made the President "improperly dependent" on the Congress. See 5 ELLIOT'S DEBATES, *supra* note 92, at 528. Governor Morris "was against a dependence of the executive on the legislature, considering the legislative tyranny the great danger to be apprehended." *Id.* Mr. Pinckney "disapproved of making the Senate the court of impeachments, as rendering the President too dependent on the legislature." *Id.*

office,¹⁹⁵ not one of disabling or one which would create future dependence by the existing Executive on the Legislature.

Congressional censure of the President carries with it the danger of destroying this Executive energy because it is a weapon which can and has been used to influence presidential decisionmaking. Recall that President Jackson was censured for acts which were certainly within his constitutional prerogatives.¹⁹⁶ Had Jackson been cowed by the intimidation of the Senate, the equilibrium of the separation of powers would have been severely altered. First, Presidents thereafter would have had justifiable fear that any use of the veto power would subject them to legislative punishment. Second, the power of Presidents to remove cabinet officers would have been severely curtailed, if not subjected purely to legislative approval. Third, and most sweeping, future Presidents would have had to worry about legislative retribution each time they acted in opposition to strongly held legislative opinion. Jackson foresaw the dangerous consequences of the Senate's action when he stated:

If by a mere denunciation like this resolution the President should ever be induced to act in a matter of official duty contrary to the honest convictions of his own mind in compliance with the wishes of the Senate, the constitutional independence of the executive department would be as effectually destroyed and its power as effectually transferred to the Senate as if that end had been accomplished by an amendment of the Constitution.¹⁹⁷

The dangers President Jackson foresaw could present themselves in many ways. A hypothetical situation will demonstrate these dangers.¹⁹⁸ Let us assume that the Congress and Presidency are controlled by different parties, and that antagonists to the President have some evidence of potential illegal activity. In addition, Congress is frustrated by the blocking of their agenda through the President's constant use of the veto. Breaking the story of the potentially illegal activity, the President's congressional opponents soon realize that the public does not perceive the alleged event to be serious enough to warrant removal from office. Congress thus begins hearings on whether to censure the President, but it appears the vote will be a narrow one, with five or so votes being decisive of the outcome. Knowing he is innocent of the charges, the President quickly realizes that the best way to be so adjudged in history is to begin currying favor with

¹⁹⁵ As Alexander Hamilton noted, the process of impeachment in the House and trial in the Senate is designed "to doom to honor or to infamy the most confidential and the most distinguished characters of the community." *THE FEDERALIST* NO. 65, at 442 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

¹⁹⁶ See *supra* discussion Part II.

¹⁹⁷ 3 PAPERS OF THE PRESIDENT, *supra* note 13, at 1305.

¹⁹⁸ Of course, real life is often richer than fiction, and this hypothetical is simply meant to illustrate that the prospect of censure may lead an irresolute President to bend the honest convictions of his own mind in return for escaping historical disgrace and infamy.

Congress by acceding to the congressional agenda he once opposed. Striking a deal with the President whereby he promises to sign offered legislation, Congress drops the consideration of censure. For ill or good, the balance of power between the Executive and Legislative branches has effectually been destroyed; Congressional opponents know the President will protect his legacy more than his principles.

Of course, any number of situations could present themselves in which the threat of censure will become a weapon to prevent the President's just exercise of his powers. The situation need not be surreptitious; the facts underlying President Jackson's censure by Congress were well known to the American public.¹⁹⁹ Though Jackson was acting constitutionally proper in firing his Treasury Secretary, employing the veto and removing the deposits from the Second Bank of the United States, public opinion was against his actions.²⁰⁰ For that reason, there was little popular recrimination against those who supported Jackson's censure.

The threat of allowing Congress power to condemn a President is tangible. The Constitution provides a framework of coequality between the different branches of government demanding that one cannot be the master of another;²⁰¹ for Congress to assert a power to censure the President thus implies a paternalistic role never intended. The prospect of censure inevitably weakens the "energy" of the Executive Branch: Through an inevitable lack of due process, by Congress's susceptibility to popular opinion and clamor, and through the threat of the "scarlet letter" should a President disobey congressional fiat. Furthermore, congressional assumption of this power is not subject to any express defense by the President.²⁰² Short term popular support for censure might be high in a given

¹⁹⁹ The Bank issue was a leading one in the 1832 election. See REMINI, *supra* note 11, at 88-108.

²⁰⁰ Jackson attempted to not make the recharter veto a major issue during the 1832 election because of the "Bank's widespread support." *Id.* at 96.

²⁰¹ Alexander Hamilton expressly spoke to this issue. He stated:

If even no propensity had ever discovered itself in the legislative body, to invade the rights of the executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left at the mercy of the other, but ought to possess a constitutional and effectual power of self defence.

THE FEDERALIST NO. 73, at 494-95 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961). Censure leaves the President at the unchecked "mercy" of Congress, without a provision for defense.

²⁰² In theory, the President could use the veto power to defend himself, but the danger might exist that exercise of the veto would subject him to impeachment and removal from office. In addition, Congress could simply pass a non-binding resolution not requiring presidential approval and not subject to the veto. Regardless of that outcome, the point is that the President is vulnerable to improper legislative influence. Of course, a President censured could appeal to the Supreme Court for protection, but many issues arise. Judicial review of

situation, but the long term effects of its threatened use are potentially disastrous because the power to punish is the power to influence and control.

V. CONCLUSION

By now, it should be readily apparent that censure violates the Constitution. Hopefully, this Note has also sufficiently explained the dangers inherent in the violation. Because of the intimate dependence of Congress upon the people, it is ill suited to try with impartiality and caution a charge in which the popular feeling is excited.²⁰³ No constitutional protection is provided to a President to ensure a fair hearing of any accusation. Furthermore, as an alternative to impeachment, censure distracts from the pertinent issue: Does the country need to be protected from the President? If so, the Constitution provides a means to remedy the President's "incapacity, negligence or perfidy."²⁰⁴ If fit to continue in office, the President should not be made improperly dependent on Congress through the threat of censure;²⁰⁵ the dangers of legislative encroachment on the Executive Branch were all too familiar to our founding fathers.

The very definition of equality rejects the existence of unchecked power by one branch of government over another. The ability of one branch to punish another thus enervates the principle of separation of powers. Though our government's coordinate branches may never truly be completely equal to each other, censure augments the power of the branch the Framers were most concerned would encroach on the others: Congress.²⁰⁶ In augmenting congressional power, censure diminishes executive power. Congressional control over a President's legacy is invariably a characteristic of bad government; the

censure is beyond the scope of this Note, but suffice it to say that no President would care to place much confidence in what the ultimate outcome might be.

²⁰³ Of course, this danger exists to an extent with the process of impeachment. However, the system of checks and balances provided in the Constitution's impeachment clauses make it very difficult for a party to unilaterally remove a president from office. Obviously, the same cannot be said for censure; both houses attempted to independently censure President Clinton, and with only a majority needed for passage.

²⁰⁴ 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 64-69; SIMPSON, *supra* note 6, at 11.

²⁰⁵ It may be important to note here that in our modern media-crazed world, the public will have ample opportunity to inquire and determine the true nature of a president's guilt or innocence. Congress's judgment will of course sway some minds, but will be largely unnecessary to inform the public at large. If this is true, then the intended effect of censure must be to punish a president for time immemorial. In fact, this was a common theme during the House of Representatives' debate over censure. For example, Representative Menendez stated that "[a] censure would put an indelible scar upon the President's place in history, something we all know this President cares about deeply." 144 CONG. REC. H11,779 (daily ed. Dec. 18, 1998).

²⁰⁶ See THE FEDERALIST NO. 51, at 351-52 (James Madison) (Jacob E. Cooke, ed. 1961).

prospect of censure hanging over the head of a President unavoidably compromises his ability to perform the executive functions necessary to the preservation of fundamental liberties.

Whether employed in a given situation with virtuous or corrupt intentions, the existence of censure as a legislative weapon is inevitably a destabilizing influence. This country's recent encounter with the process of impeachment demonstrates the ill borne out of any clash between governmental branches; the process of government is put on hold as two powerful entities battle for "victory." No laws are passed or reforms made when the political survival of a President is at stake. Moreover, the acrimony continues when the process ends, further destabilizing the government. President Andrew Jackson experienced the dangers of censure firsthand:

If the censures of the Senate be submitted to by the President, the confidence of the people in his ability and virtue and the character and usefulness of his Administration will soon be at an end, and the real power of the Government will fall into the hands of a body holding their offices for long terms If, on the other hand, the illegal censures of the Senate should be resisted by the President, collisions and angry controversies might ensue, discreditable in their progress and in the end compelling the people to adopt the conclusion either that their Chief Magistrate was unworthy of their respect or that the Senate was chargeable with calumny and injustice. Either of these results would impair public confidence in the perfection of the system and lead to serious alterations of its framework or to the practical abandonment of some of its provisions.²⁰⁷

²⁰⁷ 3 PAPERS OF THE PRESIDENT, *supra* note 13, at 1310.